BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: May 23, 1999
Case No: 1997-INA-0302

In the Matter of:

ALEXANDER and PERLA YUAG
Employer

On Behalf of:

TEOPISTA S. PAKILIT
Alien

Appearance: Dan E. Korenberg, Esq., Encino, Calif.
for the Employer and the Alien

Certifying Officer: Rebecca Marsh Day, San Francisco, Calif.

Before: Holmes, Lawson and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Teopista S. Pakilit ("Alien") filed by Employer Alexander and Perla Yuag ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the

Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

On October 20, 1994, the Employer filed an application for labor certification to enable the Alien to fill the position of Cook. (AF-272) In a Final Determination dated July 29, 1996, the Certifying Officer, citing the definition of "employment" found in 20 C.F.R. 656.3 held that Employer had failed to demonstrate that a full-time cooking position was involved. (AF-166,167).

In Daisy Schimoler, 1997-INA-218 (Mar. 3, 1999)(en banc), the Board held that "the definition of employment in section 656.3 cannot be used to attack the employer's need for the position by questioning the hours in which a worker will actually be engaged in work-related duties. Focusing solely on whether the employment will keep the worker substantially engaged throughout the day casts the problem in the wrong light-- the true issue being whether the employer has a *bona fide* job opportunity." Slip op. at 4 (footnote omitted). Rather, a CO may correctly apply the *bona fide* job opportunity analysis of 20 C.F.R. 656.20(c)(8) when it appears that the job was misclassified as a skilled domestic cook rather than some other unskilled domestic service position, or where it appears that the job was created for the purpose of promoting immigration. See, Carlos Uy III, 1997-INA-304 (Mar. 3, 1999)(en banc).

Accordingly, this matter will be remanded for issuance of a supplemental NOF for reevaluation consistent with the en banc decisions in Uy and Schimoler. See, also, Elain Bunzel, 1997-INA-481 (Mar. 3, 1999). We note that, in this case, the CO's prior handling of the issue essentially tracks the type of analysis that would be performed under section 656.20(c)(8). Citation only to the definition of employment in section 656.3 when the issue is the nature of the position, however, gives inadequate notice of what is really being questioned by the CO. Schimoler, *supra.* The distinction in the analysis is that rather than focusing solely on whether the employee will be gainfully occupied for a substantial portion of the work day, an employer must show that the position is a bona fide job opportunity under the totality of the circumstances. See Uy, *supra*, slip op at 10-12. Lack of sufficient duties to keep the worker busy may be an important credibility problem for an employer under the totality of circumstances test. While it can be the sole determinative factor in some individual cases,(see, Mary Cowan, 976-INA-343 (March 19, 1999), due in part to the nature of the situation, in most cases whether or not full-time employment has been demonstrated by Employer probably should and will not be the determinative factor.

On remand, the CO may wish to reinstitute the issue set out in the Notice of Findings, of whether or not the requirement of Filipino cooking is unduly restrictive.

ORDER

The Certifying Officer's denial of labor certification is VACATED, and the matter remanded for appropriate action by the Certifying Officer.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such

labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate

detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge